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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>EDWARD TERRELL,<br><br>Defendant and Appellant. | C086533<br><br>(Super. Ct. Nos. STKCRFE19950005931, SC058164A) |

Defendant Edward Terrell appeals from the trial court's denial of his Penal Code[1] section 1170.18 petition on his conviction for receiving stolen property (§ 496). He contends the trial court erred in finding his offense ineligible for resentencing. We shall reverse and remand for additional proceedings on the petition.

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**1** Further undesignated sections are to the Penal Code.

## FACTUAL AND PROCEDURAL BACKGROUND

On December 2, 1994, defendant drove a recently stolen 1979 Chrysler LeBaron. A California state police officer tried to detain defendant, but defendant abandoned the car and ran away. He was apprehended by the officer after a brief chase.

Following a jury trial, defendant was convicted of receiving stolen property. (*People v. Terrell* (March 18, 1997, C021377) [nonpub. opn.] at p. 1.) The trial court sustained four prior prison term allegations and one strike allegation, and, after striking one of the prison priors, imposed a seven-year state prison term. (*Id*. at pp. 1-2.) We affirmed his conviction on appeal. (*Id*. at p. 12.)

Defendant filed a section 1170.18 petition for resentencing on November 28, 2017. The petition alleged he was eligible for resentencing because the stolen property he received, " 'an old run down Chrysler,' " did not exceed $950.

The following exchange took place between the trial court and the prosecutor at the beginning of the hearing on defendant's petition:

"[Prosecutor]: In this case, your Honor, similar, except the car was worth about $450.

"The Court: $450?

"[Prosecutor]: Yes. So --"

The trial court determined that defendant was not the person who stole the Chrysler LeBaron. It found that under California Supreme Court precedent, there was a distinction between taking and unlawful driving, so that "if you are driving the car, regardless of the value, it is a felony," and denied the petition on this ground.

## DISCUSSION

Defendant contends the trial court erred in finding his receiving offense ineligible for resentencing. The People concede the point. This is correct.

Proposition 47 reduced numerous felonies to misdemeanors, including receiving stolen property. (§ 1170.18, subd. (a).) Following Proposition 47, absent certain

exceptions not relevant here, the crime of receiving stolen property is a misdemeanor if the value of the stolen property received does not exceed $950. (§ 496, subd. (a).) A defendant is eligible for relief if he or she would have been guilty of a misdemeanor if Proposition 47 was in effect at the time of the crime. (§ 1170.18, subd. (a).) If the defendant is currently serving a term for the eligible crime, he or she is entitled to resentencing unless the trial court determines that resentencing the defendant poses an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).) A defendant who has completed the term for the crime is entitled to have the qualifying offense redesignated a misdemeanor. (§ 1170.18, subd. (f).)

The trial court's ruling is apparently based on the California Supreme Court's decision in *People v. Page* (2017) 3 Cal.5th 1175, where it held that convictions for unlawfully driving a vehicle (Veh. Code, § 10851) were eligible for section 1170.18 resentencing if the crime was based on unlawfully taking the vehicle, but convictions based on unlawfully driving a vehicle were ineligible for relief. (*Page*, at p. 1188.) The Supreme Court made this distinction in *Page* because it was applying section 490.2, which applied the greater than $950 threshold to all forms of theft, " 'Notwithstanding [Penal Code] Section 487 or any other provision of law defining grand theft . . . .' " (*Page*, at p. 1182.) This distinction does not apply to the crime of receiving stolen property, which is a misdemeanor unless the property is worth more than $950, regardless of whether the defendant is the person who took it. Defendant's receiving crime is eligible for resentencing.

While the parties agree the trial court erred, they disagree on the remedy. Noting that defendant bears the burden of proving his eligibility for resentencing (see *People v. Page*, *supra*, 5 Cal.5th at p. 1188), the People assert we should reverse the order denying the petition and remand for an evidentiary hearing so that defendant can attempt to prove the Chrysler was not worth more than $950. Defendant contends remand is unnecessary in light of the prosecutor's statement regarding the car's value. We agree with defendant.

"A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48.) It is "ordinarily *a factual allegation by one party that is admitted by the opposing party*," with the result being the "allegation is removed from the issues . . . because the parties *agree* as to its truth." (*Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446, 452.) "[A]n oral statement by counsel in the same action is a binding judicial admission if the statement was an unambiguous concession of a matter then at issue and was not made improvidently or unguardedly." (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752.) However, "statements of counsel in argument are not deemed judicial admissions unless they have the formality of an admission or a stipulation." (*People v. Kiney* (2007) 151 Cal.App.4th 807, 815.)

The prosecutor's statement regarding the Chrysler's value unambiguously stated that it was under the $950 limit for misdemeanor receiving stolen property. While it was made at the outset of a brief hearing in which the People ultimately prevailed on another (albeit incorrect) ground, we do not view the prosecutor's statement as incidental or part of a running argument. We also find it was not improvident to admit that the 1979 Chrysler LeBaron was worth around $450 when defendant received it as stolen property in 1994. It was a judicial admission binding the People in this proceeding.

While the prosecutor's admission relieves defendant of carrying his burden of proving his crime is eligible for relief, a remand for additional proceedings is still necessary. Section 1170.18, subdivision (i) "does not apply to a person who has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290." After defendant meets the burden of establishing eligibility, "Proposition 47 then allows the prosecution the opportunity to oppose the petition by attempting to establish that the petitioning defendant is *ineligible*

for resentencing. [Citation.] This may be accomplished either (1) by rebutting the petitioning defendant's evidence, thereby demonstrating that the petitioning defendant would *not* have been guilty of a misdemeanor had Proposition 47 been in effect at the time of the offense (§ 1170.18, subd. (a)), or (2) by demonstrating that the petitioning defendant suffered a conviction of one or more of the offenses specified in section 1170.18, subdivision (i)." (*People v. Johnson* (2016) 1 Cal.App.5th 953, 965; accord, *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095.)

While the People's judicial admission forecloses the first method listed in *Johnson*, the People may try to demonstrate on remand that defendant has a disqualifying conviction.

DISPOSITION

The order denying defendant's section 1170.18 petition is reversed and the matter is remanded for additional proceedings on the petition as specified in this opinion.

/s/
Robie, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Murray, J.